

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

JULIE DALESSIO, an individual,

Plaintiff,

v.

UNIVERSITY OF WASHINGTON, a
Washington Public Corporation; ELIZA
SAUNDERS, Director of the Office of
Public Records, in her personal and official
capacity; ALISON SWENSON, Compliance
Analyst, in her personal capacity; PERRY
TAPPER, Public Records Compliance
Officer, in his personal capacity; ANDREW
PALMER, Compliance Analyst, in his
personal capacity; JOHN or JANES DOES
1-12, in his or her personal capacity,

Defendants.

No. 2:17-cv-00642-MJP

DEFENDANTS' MOTION TO AMEND
ANSWER TO ADD TWO
AFFIRMATIVE DEFENSES

Noted: July 27, 2018

I. INTRODUCTION

Defendants respectfully request permission for leave to amend their Answer to Plaintiff's First Amended Complaint to add two affirmative defenses: Good Faith Immunity under RCW 42.56.060 and Discretionary Immunity. Defendants bring this motion prior to the deadline for amending pleadings, and have not sought to amend their Answer previously. This is the second Answer filed in this lawsuit, but that resulted from the Court granting permission to Plaintiff to Amend her Complaint after she was appointed counsel. The Court has issued an entirely new case schedule which reset almost all of the court deadlines, and Plaintiff will suffer no prejudice from this amendment. Attached as

Exhibit 1 is a copy of the proposed amended Answer.

II. STATEMENT OF FACTS

Plaintiff filed a First Amended Complaint on April 12, 2018, adding four named individual Defendant-employees of the University and twelve new “Jane/John Doe” Defendants who appear to be either current or former employees of the University. *Dkt. 82*. Defendants filed an Answer to Plaintiff’s First Amended Complaint on June 12, 2018. *Dkt. 95*. The Court issued a new case schedule on June 19, 2018, *Dkt. 96*, which essentially reset the case. The new (relevant) deadlines are now:

- Deadline for filing amended pleadings – July 27, 2018
- All motions related to discovery – November 7, 2018
- Discovery completed by – December 7, 2018
- Dispositive motions – January 7, 2018

Id. Plaintiff’s counsel was unavailable from June 27 to July 11, 2018. *Dkt. 69*. Despite attempts by email and phone, the parties were unable to agree to a stipulation to amend the answer prior to the deadline for filing amended pleadings. *Chen Decl.*, at ¶ 2.

III. ARGUMENT AND ANALYSIS

Amendments to a pleading after twenty-one days from the date of service may only be granted with the opposing party’s written consent or the court’s leave. FRCP 15(a)(2). “The court should freely give leave when justice so requires.” *Id.* “This policy is to be applied with extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). Defendants seek leave to add two affirmative defenses: Good Faith Immunity under RCW 42.56.060 and Discretionary Immunity.

A. One or More Defendants Are Entitled to Good-Faith Immunity for All State-Law Claims.

“No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good

1 faith in attempting to comply with the provisions of this chapter.” RCW 42.56.060. This
 2 immunity acts as a **complete bar** to state law claims in PRA cases. *Nicholas v. Wallenstein*,
 3 266 F.3d 1083, 1087 (9th Cir.2001) (“Under the PDA, good faith was a complete defense.
 4 Wash. Rev.Code § 42.17.258. As Graber had consulted county counsel, there was no doubt
 5 that he had acted in good faith. None of the plaintiffs' state law claims survived this
 6 conclusion.”)¹; *Levine v. City of Bothell*, No. 2:11-CV-1280-MJP, 2012 WL 2567095, at
 7 *3-4 (W.D. Wash. July 2, 2012) (Unpublished.)

8 Plaintiff's First Amended Complaint contains state law claims against a number of
 9 individual Defendants based on their production of documents or other acts involved in
 10 locating and transmitting documents pursuant to the Public Records Act, including a
 11 “Common Law Tort” claim for “Public Disclosure of Private Facts” allegedly caused by
 12 staff efforts to comply with the obligations of the PRA. *Dkt.* 82, at p. 26. Plaintiff's state
 13 law claims will be barred by this immunity, and therefore it is in the interests of justice to
 14 permit Defendants' leave to add this affirmative defense.

15 **B. One or More Defendants Are Entitled to Discretionary Immunity.**

16 Washington courts have repeatedly found that “in any organized society there must
 17 be room for basic governmental policy decision and the implementation thereof,
 18 unhampered by the threat or fear of sovereign tort liability. In other words, it is not a tort for
 19 government to govern.” *Avellaneda v. State*, 167 Wash. App. 474, 480, 273 P.3d 477, 480
 20 (2012) (internal quotations and citations omitted.)

21 Holding that it is necessary to draw the line between “truly
 22 discretionary and other executive and administrative
 23 processes,” the *Evangelical* court announced a four-factor test
 24 to determine when discretionary immunity applies:

- 25 (1) Does the challenged act, omission, or decision necessarily
 26 involve a basic governmental policy, program, or objective?
- (2) Is the questioned act, omission, or decision essential to the
 realization or accomplishment of that policy, program, or
 objective as opposed to one which would not change the

27 ¹ RCW 42.17.258 (formerly known as the “Public Disclosure Act”) has been recodified as
 RCW 42.56.060 (now known as the “Public Records Act”).

course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Id. (citing *Evangelical United Brethren Church of Adna v. State*, 67 Wash.2d 246, 407 P.2d 440 (1965)).

Plaintiff has named Eliza Saunders, Director of the Office of Public Records, presumably based solely on Plaintiff's belief of her role in oversight of the Office of Public Records and Open Meetings. There is no evidence that Eliza Saunders made any redactions or specific decisions relevant to the information Plaintiff believes was improperly disclosed, or that she personally located, provided, or produced any documents. Presumably, Plaintiff has named her in her capacity as the Director and for alleged actions related to developing basic governmental programs and policies of the University of Washington Office of Public Records for processing of millions of documents requested, reviewed, and produced (or redacted or withheld as exempt) each year. ("It is under belief that Defendants Saunders, Tapper, Swenson, Palmer and Does 1-12 encouraged, sanctioned, and ratified a practice of searching and producing documents out of personnel files, laboratory medical file, and disability services file." *First Amended Complaint*, at ¶ 152.)

The PRA requires that public agencies search all places where responsive documents may be located. ("The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents." *Neighborhood All. of Spokane Cty. v. Spokane Cty.*, 172 Wash. 2d 702, 720, 261 P.3d 119, 128 (2011)). Any act or decision by Eliza Saunders, and potentially other defendants (depending on the allegations after they are clarified) regarding, for example, a practice or policy of how departments identify, locate, and collect documents pursuant to the requirements of the Public Records Act, as well as how to evaluate for potential exemptions involves the exercise of basic policy evaluation, judgment, and expertise

1 necessary to implement programs to meet the statutory requirements of the PRA in an
 2 enormous public agency like the University of Washington. These decisions would likely
 3 be entitled to discretionary immunity under State law. Public officials weigh the risks and
 4 benefits when crafting how departments will respond to requests for documents based on
 5 the public official's knowledge and expertise with the goal of complying with the PRA.
 6 Depending on how Plaintiff's claims materialize, it is entirely possible that claims against
 7 one or more defendants will be dismissed on the basis of discretionary immunity.

8 **C. The Requested Amendment Serves the Purposes of Justice.**

9 The Federal Rules of Civil Procedure "should be construed, administered, and
 10 employed by the court and the parties to secure the just, speedy, and inexpensive
 11 determination of every action and proceeding." FRCP 1. It serves the interests of justice to
 12 permit additional, non-prejudicial affirmative defenses that may lead to the efficient
 13 dismissal of some or all defendants or claims. Plaintiff will not suffer any prejudice from
 14 these amendments, as she is still months away from the discovery deadline, and she has yet
 15 to take any depositions.

16 **IV. CONCLUSION**

17 For the reasons stated above, Defendants respectfully request the Court grant their
 18 motion to amend their Answer.

19 DATED: July 12, 2018

20 KEATING, BUCKLIN & McCORMACK, INC., P.S.

21
 22 By: /s/ Jayne L. Freeman

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED: July 12, 2018

/s/ Jayne L. Freeman

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